

23-15479

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM BARKER,

Plaintiff-Appellant,

v.

OSEMWINGIE, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of California

No. 2:16-cv-03008 CKD
Carolyn K. Delaney, Magistrate Judge

**APPELLEES' SUPPLEMENTAL EXCERPTS
OF RECORD VOLUME 1 OF 1**

ROB BONTA
Attorney General of California
JODI L. CLEESATTLE
Senior Assistant Attorney General
CATHERINE WOODBRIDGE
Supervising Deputy Attorney General
DIANA ESQUIVEL
Deputy Attorney General
State Bar No. 202954
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 210-7320
Facsimile: (916) 322-8288
Email: Diana.Esquivel@doj.ca.gov
*Attorneys for Defendants-Appellees State of
Cal., by and through Cal. Dept. of Corr. and
Rehab., Osemwingie, and Ramiscal*

APPELLEES' SUPPLEMENTAL EXCERPTS OF RECORD
Volume 1 of 1

<u>CR</u>	<u>Document</u>	<u>Date</u>	<u>Page(s)</u>
95	Defendant's Response to Plaintiff's Objections to Magistrate Judge's Findings and Recommendations	9/29/22	3-9
93	Plaintiff's Objections to Magistrate Judge's Findings and Recommendations	9/15/22	10-12
88	Plaintiff's Fourth Amended Complaint	4/12/22	13-19
87	Order	4/7/22	20-21
86	Plaintiff's Third Amended Complaint [erroneously filed as "Second Amended Complaint"]	4/1/22	22-28
85	Order	3/4/22	29-30
83	Memorandum [in <i>Barker v. Osemwingie</i> , Nos. 20-15503/20-155840]	11/29/21	31-35
63-5	Declaration of Diana Esquivel in Support of Defendants' Motion for Summary Judgment	4/24/19	36-44
47	Plaintiff's [Third] Amended Complaint [erroneously filed as "Second Amended Complaint"]	1/19/18	45-51

SA2023302025
37766078.docx

1 ROB BONTA, State Bar No. 202668
Attorney General of California
2 CHRISTINE E. GARSKE, State Bar No. 232879
Supervising Deputy Attorney General
3 DIANA ESQUIVEL, State Bar No. 202954
Deputy Attorney General
4 1300 I Street, Suite 125
P.O. Box 944255
5 Sacramento, CA 94244-2550
Telephone: (916) 210-7320
6 Facsimile: (916) 322-8288
E-mail: Diana.Esquivel@doj.ca.gov
7 *Attorneys for Defendant State of California, by and*
8 *through the California Department of Corrections*
and Rehabilitation

9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE EASTERN DISTRICT OF CALIFORNIA
11 SACRAMENTO DIVISION
12

13 **WILLIAM BARKER,**

14 Plaintiff,

15 v.

16 **OSEMWINGIE, et al.,**

17 Defendants.
18
19

No. 2:16-cv-03008-DAD-CKD

**RESPONSE TO PLAINTIFF'S
OBJECTIONS TO MAGISTRATE
JUDGE'S FINDINGS AND
RECOMMENDATIONS**

Action Filed: April 12, 2017

20 **INTRODUCTION**

21 Plaintiff does not object to the Magistrate Judge's Findings and Recommendations (F&R)
22 recommending that his Fourth Amended Complaint be dismissed without leave to amend because
23 the Magistrate Judge's analysis is legally or factually erroneous. Rather, he contends that he filed
24 the wrong version of the Fourth Amended Complaint; he submits a proposed Fifth Amended
25 Complaint (FAC) for the Court's consideration; and he asks that the Court reject the F&R
26 because the proposed FAC complies with the Ninth Circuit's Memorandum. (ECF Nos. 93, 93-1.)
27 The Court should overrule Plaintiff's objections because the proposed FAC still fails to plead a
28 cognizable claim under the Americans with Disabilities Act (ADA) and Rehabilitation Act (RA).

ARGUMENT

The ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. While the RA has the additional requirement that the program or activity receive federal funds, 29 U.S.C. § 794, “[t]here is no significant difference in analysis of the rights and obligations created by the ADA and the Rehabilitation Act. Thus, courts have applied the same analysis to claims brought under both statutes.” *Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041, 1045 n.11 (9th Cir. 1999) (citations omitted). In order to state a cognizable claim under the ADA, a plaintiff must allege facts showing he: (1) has a disability; (2) is otherwise qualified to participate in or receive the benefit of “some public entity’s services, programs or activities,” (3) was excluded from or denied the benefits of a program, activity or service, or otherwise discriminated against, and (4) “such exclusion, denial of benefits, or discrimination was by reason of his disability.” *O’Guinn v. Lovelock Corr. Ctr.*, 502 F.3d 1056, 1060 (9th Cir. 2007); *Duvall v. County of Kitsap*, 260 F.3d 1124, 1135-36 (9th Cir. 2001) (stating that a RA claim is analyzed under the same standards). A public entity can be liable for damages under the ADA or RA only “if it intentionally or with deliberate indifference fails to provide meaningful access or reasonable accommodation to disabled persons.” *Mark H. v. Lemahieu*, 513 F.3d 922, 938 (9th Cir. 2008). Deliberate indifference requires: (1) “knowledge that a harm to a federally protected right is substantially likely,” and (2) “a failure to act upon that the likelihood.” *Duvall*, 260 F.3d at 1139.

The Ninth Circuit remanded this matter finding that the district court should have given Plaintiff an opportunity to cure the deficiencies in his ADA and RA claims. (ECF No. 83 at 3.) The Ninth Circuit advised that “[t]o allege a plausible claim for relief, Barker will need to provide additional facts explaining how the State’s failed attempt to provide access to toileting services by means of the Hoyer lift amounted to a denial of such services on account of his disability. In addition, because Barker seeks damages under Title II, he will need to plead facts plausibly suggesting that the defendants acted with deliberate indifference under the test established in

1 *Duvall v. County of Kitsap*, 260 F.3d 1124, 1138-40 (9th Cir. 2001).” (ECF No. 83 at 3-4.) The
 2 proposed FAC does not comport with the Ninth Circuit’s directives.

3 In the proposed FAC, Plaintiff alleges that on March 3, 2015, he needed to use the
 4 bathroom and called for assistance; Certified Nursing Assistants Osemwingie and Ramiscal
 5 arrived at his cell, bringing with them a Liko Golvo 7007 ES Hoyer lift to transfer him from his
 6 wheelchair to the toilet. (FAC ¶¶ 15-16.) Plaintiff alleges that, “based on past experience,” he
 7 advised Osemwingie against its use and requested a two-person lift to accomplish the transfer to
 8 the toilet. (FAC ¶ 16.) Plaintiff alleges that Osemwingie refused and informed Plaintiff that if the
 9 Hoyer lift was not used, he was not going to assist Plaintiff. (FAC ¶ 17.) Plaintiff alleges he
 10 acquiesced because he had to use the “restroom very badly.” (*Id.*) Plaintiff alleges that, “under
 11 normal circumstances,” he would sit in a sling with four straps—the top two straps are brought
 12 over each shoulder and attached to the lift, and the bottom straps are crisscrossed over his legs
 13 before they are attached to the lift, so that his body sat inside the sling, and he would not slide
 14 out. (FAC ¶ 18.) Plaintiff alleges that Osemwingie placed the two top straps under his armpits
 15 instead of over his shoulders and did not cross the bottom straps between his legs. (FAC ¶ 19.)
 16 Plaintiff alleges that he began to protest about how the Hoyer lift was going to hurt his back and
 17 irritate the bullet under his scrotum, but Osemwingie refused to listen and reassured Plaintiff that
 18 he (Osemwingie) “was going to lift him in a way that didn’t hurt the bullet or his back,” while
 19 Ramiscal and another employee questioned Osemwingie’s technique. (FAC ¶ 20.) Plaintiff
 20 alleges that when Osemwingie turned on the lift and started lifting him, so that Plaintiff was about
 21 six inches high, he heard his low back pop, and he screamed out in pain. (FAC ¶ 21.) Plaintiff
 22 alleges that Osemwingie lowered him down, and Plaintiff immediately asked for medical
 23 attention, but Osemwingie disconnected him from the lift and everyone left the cell. (FAC ¶ 22.)
 24 Plaintiff alleges that Osemwingie and Ramiscal were aware of Plaintiff’s physical limitations and

25 ///

26 ///

27 ///

1 had assisted with transferring him from one position to another before March 3, 2015. (FAC
2 ¶¶ 25-26.)¹

3 In his first claim under the ADA, Plaintiff alleges that the “State’s failed attempt to provide
4 access to toileting services by means of the Hoyer lift amounted to a denial of such services on
5 account of his disability.” (FAC ¶ 34.) He further alleges that Hoyer lifts qualify as healthcare
6 appliances under the *Armstrong v. Newsom*, No. 4:94-cv-02307-CW (N.D. Cal. 1994), decree and
7 that defendant had a duty to operate that lift properly under the decree. (FAC ¶ 34.) Plaintiff
8 further alleges that defendant’s failure to operate the Hoyer lift was not only an ADA violation,
9 “but the precise type of violation the decree was designed to remedy.” (FAC ¶ 35.) Plaintiff
10 proceeds to allege that the improper use of the Hoyer lift to transfer him from his wheelchair, and
11 prolonged delay in receiving medical and nursing assistance, resulted in discrimination against
12 him by prolonging his suffering needlessly. (FAC ¶ 35.) He further alleges that the State’s failure
13 to comply with the Hoyer lift instruction manual, over his verbal protests, when transferring him
14 to the toilet constituted deliberate indifference, and “even if it didn’t, the State’s need to follow
15 the *Armstrong* consent decree ... and Hoyer lift’s instruction manual was obvious.” (FAC ¶ 36.)
16 Plaintiff alleges that because “these acts and omissions were performed without regard for the
17 accommodation Barker requested, the State engaged in deliberate indifference entitling plaintiff
18 to actual damages.” (*Id.*)

19 In the second claim under the RA, Plaintiff alleges that Defendants receive federal funding
20 and “[f]or the same reasons set forth in Count One, the defendants were deliberately indifferent to
21 plaintiff’s rights under the Rehab Act by improperly operating the Hoyer lift to transfer Barker
22 from his wheelchair, and unreasonably delaying their response to his request for medical and
23 nursing assistance.” (FAC ¶¶ 40-41.)

24 These allegations fail to meet the pleading requirements for an ADA and RA claim.
25 Plaintiff was required to plead specific facts to show that he was denied access to toileting

26
27 ¹ Under the “Facts” section, Plaintiff asserts additional facts concerning the delay in
28 providing him with medical treatment. (FAC ¶¶ 22-24.) These allegations are immaterial and do
not provide a separate basis for an ADA or RA claim because the Ninth Circuit did not find that
these allegations plausibly stated a claim under the ADA or RA. (*See generally*, ECF No. 83.)

1 services because of his disability. *O’Guinn*, 502 F.3d at 1056. Indeed, the Ninth Circuit advised
 2 him of the need to “provide additional facts *explaining how* the State’s failed attempt to provide
 3 access to toileting services by means of the Hoyer lift amounted to a denial of such services *on*
 4 *account* of his disability.” (ECF No. 83 at 3, emphasis added.) Plaintiff simply cut and paste this
 5 directive into paragraph 34 of the proposed FAC, but did not allege any facts explaining how use
 6 of the lift resulted in the denial of toileting service because of his disability. That the State had a
 7 duty to operate the lift properly under some purported *Armstrong* decree or instruction manual
 8 does not show or establish that the State used the lift improperly, resulting in the denial of
 9 toileting services, on account of his disability.² Similarly, Plaintiff’s allegation that the improper
 10 use of the lift resulted in discrimination against him (FAC ¶ 35) is insufficient to meet his
 11 pleading burden. Under the ADA, Plaintiff is required to plead facts showing that he was
 12 discriminated against because of his disability, not that the denial of some service resulted in
 13 discrimination.

14 The allegations in the proposed FAC also fail to comply with the Ninth Circuit’s directive
 15 that he is required to “plead facts plausibly suggesting that the defendants acted with deliberate
 16 indifference.” (ECF No. 83 at 3-4.) Under *Duvall*, deliberate indifference requires both
 17 knowledge that a harm to a federally protected right is substantially likely, and a failure to act
 18 upon that likelihood. *Duvall*, 260 F.3d at 1139. In the context of a reasonable accommodation
 19 request, the plaintiff is required to identify “specific reasonable” and “necessary”
 20 accommodations that the defendant failed to provide. *Id.* “When the plaintiff has alerted the
 21 public entity to his need for accommodation (or where the need for accommodation is obvious, or
 22

23 ² The Court need not accept as true Plaintiff’s allegations that the manner in which
 24 Osemwingie used the Hoyer lift was contrary to the instruction manual. Although the Court is
 25 generally confined to consideration of the allegations in the pleadings, the Court may consider
 26 documents that are not physically attached to the complaint where the authenticity of the
 27 document is not contested and the complaint necessarily relies on them. *Lee v. Cty. of L.A.*, 250
 28 F.3d 668, 688-89 (9th Cir. 2001). The instruction manual to the Hoyer lift Plaintiff alleges was
 used on March 3, 2015, provides that the lift can be used in the manner Osemwingie did, as
 Plaintiff described in paragraph 19 of the proposed FAC. (See Liko Golvo Instruction Guide at p.
 13, ECF No. 67-4 at 59.) Plaintiff cannot reasonably dispute its authenticity since he submitted
 the manual in opposition to Defendants Osemwingie’s and Ramiscal’s motion for summary
 judgment. (*Id.*)

1 required by statute or regulation), the public entity is on notice that an accommodation is
2 required, and the plaintiff has satisfied the first element of the deliberate indifference test.” *Id.*

3 In the proposed FAC, Plaintiff simply alleged that the State’s failure to comply with the
4 instruction manual constituted indifference. (FAC ¶ 36.) No facts are alleged to show that the
5 State knew harm to Plaintiff was substantially likely. Indeed, Plaintiff alleged that Osemwingie
6 reassured him that he (Osemwingie) was going to lift in a way that “didn’t hurt the bullet or his
7 back” (FAC ¶ 20), leading to a reasonable inference that Osemwingie took care not to injure
8 Plaintiff during the use of the Hoyer lift. This allegation negates the State’s knowledge that
9 Plaintiff was substantially likely to be harmed. To the extent Plaintiff alleges that he sought an
10 accommodation, the allegations are vague and do not satisfy the first prong of *Duvall*. Although
11 Plaintiff alleges that he requested that Osemwingie transfer him to the toilet using a two-person
12 lift (FAC ¶ 16), his allegations in his ADA and RA claims are not directed at the failure to
13 perform a manual lift, but rather at the manner in which the Hoyer lift was used—placing the
14 strap under Plaintiff’s arms rather than under his buttocks to cradle his body. (FAC ¶¶ 34-36.)
15 Nor do Plaintiff’s allegations concerning the *Armstrong* decree and the lift’s instruction manual
16 satisfy the pleading requirements for deliberate indifference. Plaintiff did not plead facts to show
17 that either the decree or the manual required the accommodation Plaintiff requested, a manual lift.
18 Rather, Plaintiff alleges that the decree and manual speak to the proper use and operation of the
19 lift. (FAC ¶¶ 34-36.) For these reasons, Plaintiff’s allegations in the RA claim—that defendants
20 were deliberately indifferent by improperly using the lift—are conclusory and also do not satisfy
21 the pleading requirements for deliberate indifference under *Duvall*.

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28

1 **CONCLUSION**

2 Plaintiff's proposed FAC is equally deficient as his prior complaints and does not state
3 cognizable claims under the ADA or RA.³ Plaintiff has clearly demonstrated that he cannot plead
4 such a claim against the State as evidenced by his deficient proposed FAC. The Court should
5 therefore adopt the Magistrate Judge's F&R and dismiss the Fourth Amended Complaint without
6 leave to amend.

7
8 Dated: September 29, 2022

Respectfully submitted,

9 ROB BONTA
10 Attorney General of California
11 CHRISTINE E. GARSKE
Supervising Deputy Attorney General

12 */s/ Diana Esquivel*

13 DIANA ESQUIVEL
14 Deputy Attorney General
15 *Attorneys for Defendant State of California,
by and through the California Department of
Corrections and Rehabilitation*

16 SA2017304374
17 36595671.docx
18
19
20
21
22
23

24 _____
25 ³ The proposed FAC contains other pleading deficiencies not discussed in this response.
26 Here, Defendant only responds to Plaintiff's contention that the proposed FAC "addresses the
27 pleading requirements set forth in the Ninth Circuit's memorandum." (ECF No. 93 at 3:1-3.)
28 Defendant's decision not to address the other defects in this response is not a waiver of those
objections, and Defendant reserves the right to raise further objections to the proposed FAC in a
properly noticed motion to dismiss under Federal Rule of Civil Procedure 12, if such becomes
necessary.

Attorneys for Plaintiff William Barker

Defendants.

Objections to Magistrate Judge's Findings and Recommendations (Clerk's Record 90)

OBJECTION

On September 1, 2022, the Honorable Carolyn Delaney issued findings and recommendations regarding the screening of plaintiff William Barker's complaint. Specifically, the magistrate found:

The allegations in plaintiff's second and fourth amended complaints with respect to plaintiff's claims arising under the ADA and RA are the same. This being the case, the fourth amended complaint must, under the terms of the Ninth Circuit's remand order, be dismissed for failure to state a claim. As it appears at this point that plaintiff cannot state a claim under the ADA or the RA, giving leave to file a fifth amended complaint appears futile.

CR 90, p. 2 (underline added). On the former (the allegations are the same), the magistrate judge was correct. On the latter (a fifth amended complaint would be futile), she was not.

Plaintiff's counsel used the second amended complaint as a template when drafting the fourth, which is why the allegations were the same. Unfortunately, when it came time to file, we mistakenly submitted an earlier draft that still mirrored the allegations from the second, in essence refiling the same complaint a second time. An embarrassing mistake to be sure, but hardly a fatal one.¹

¹ *Owens v. Kaiser Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001), quoting *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990) (Rule 15's requires that leave to amend "shall be freely given when justice so requires" must "be applied with extreme liberality."); *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) ("Absent prejudice, or a strong showing of any of the remaining *Forman* factors, there exists a *presumption* under Rule 15(a) in favor of granting leave to amend.") (emphasis in original).

1 As the court will see from the attached pleading, Barker's (proposed) Fifth
2 Amended Complaint includes greater detail and, more importantly, addresses the
3 pleading requirements set forth in the Ninth Circuit's memorandum. For these
4 reasons, we would ask the Court to reject the magistrate's findings and
5 recommendations; and accept the proposed Fifth Amended Complaint for filing.

6 Dated: September 14, 2022

ZINK & LENZI

7
8 /s/ J.D. Zink

9 J.D. ZINK

10 Attorney for Plaintiff Barker
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 J.D. Zink, SBN 58726
2 **Zink & Lenzi**
3 250 Vallombrosa Avenue, Suite 175
4 Chico, California 95926
5 Telephone: (530) 895-1234
6 Facsimile: (530) 895-1254
7
8
9

10 United States District Court
11 Eastern District of California

12 William Barker,)
13)
14 Plaintiff,) Case No. 2:16-cv-3008-CKD
15 v.) **Fourth Amended Complaint**
16)
17 California Department of Corrections)
18 and Rehabilitation; The State of)
19 California,)
20 Defendants.)
21)
22)
23)
24)
25)
26)
27)
28)

COMPLAINT

1
2 1. Plaintiff William Barker (“Barker”) complains that the California
3 Department of Corrections and Rehabilitation (“CDCR”), the State of California,
4 and Certified Nursing Assistants (“CNA”) Stephen Osemwingie (“Osemwingie”)
5 and Ms. Ramiscal (“Ramiscal”) discriminated against him on the basis of his
6 disability at the California Health Care Facility (“CHCF”) and, thus, violated state
7 and federal disabled access laws.

PARTIES

8
9 2. Barker is a California resident with physical disabilities. He is in the
10 custody, care, and control of CDCR incarcerated at CHCF in Stockton, CA. CDCR
11 physicians have diagnosed Barker with having a history of chronic infectious
12 disease, a right femur fracture with open reduction and internal fixation, and severe
13 degenerative arthritis in his right hip. Barker suffers from pain in his back,
14 shoulder, and neck. Additionally, he has shrapnel lodged in his pelvic region that
15 surgeons are unable to remove which cause him pain when moving. He requires a
16 wheelchair for ambulating both inside and outside of his cell. He is unable to bend,
17 squat, or kneel, lift more than five pounds, climb stairs, and is subject to falls.

18 3. Barker was designated DPW under the *Armstrong* Consent Decree, as
19 an inmate who requires the use of a wheelchair on a full-time basis due to a
20 permanent disability. He requires wheelchair accessible housing and accessible
21 paths of travel.

22 4. The State of California is a public entity.

23 5. CDCR is a department or agency (or both) of the State of California.

24 6. Osemwingie is an employee of the State of California, was a CNA at
25 the time Barker’s injury occurred, and was charged with the care, custody and
26 safety of the inmates at CHCF, including Barker. Osemwingie was acting under
27 the color of state law during all times at issue.
28

1 7. Ramiscal is an employee of the State of California, was a CNA at the
2 time Barker's injury occurred, and was charged with the care, custody and safety
3 of the inmates at CHCF, including Barker. Ramiscal was acting under the color of
4 state law during all times at issue.

5 **JURISDICTION**

6 8. This Court has original jurisdiction under 28 U.S.C. §§ 1331 and 1343
7 for claims brought under Title II of the Americans with Disabilities Act of 1990
8 ("ADA"), Section 504 of the Rehabilitation Act of 1973 ("Rehab Act"), and state
9 law claims that arise under federal law because Barker's right to relief under those
10 claims necessarily depend on resolving a substantial question of federal law.

11 9. Supplemental jurisdiction for claims brought under parallel California
12 law – arising from the same nucleus of operative facts – is predicated on 28 U.S.C.
13 § 1367.

14 10. Barker's claims are authorized by 28 U.S.C. §§ 2201 and 2202.

15 **VENUE**

16 11. All actions complained of herein take place within the jurisdiction of
17 the United States District Court, Eastern District of California, and venue is
18 invoked pursuant to 28 U.S.C. § 1391(b), (c).

19 **FACTS**

20 12. The Disability Placement Program ("DPP") is the CDCR's set of
21 plans, policies, and procedures to assure nondiscrimination against
22 inmates/parolees with disabilities. The DPP applies to all CDCR institutions and
23 facilities, all programs that CDCR provides or operates, and to all inmates who
24 have disabilities that affect a major life activity, regardless of whether the disability
25 impacts placement. Under this program, inmates with permanent mobility
26 impairments, or other disabilities severe enough to require special housing and
27 programming, are assigned to special placement in a "designated DPP facility."
28

1 13. CHCF is a designated DPP facility.

2 14. Designated DPP facilities are required to offer disabled inmates a
3 range of programming equivalent to that available to nondisabled inmates.

4 15. On or about March 3, 2015, Barker needed assistance in transferring
5 himself from his wheelchair to the toilet. CNAs Osemwingie and Ramiscal
6 responded to Barker's call for assistance.

7 16. Over Barker's objections to its use, Osemwingie and Ramiscal
8 employed a hooyer lift to effectuate the transfer of Barker from his wheelchair to
9 his toilet. Osemwingie and Ramiscal failed to use the device as it was designed to
10 be operated: rather than placing Barker's whole body in the lift, they instead placed
11 the straps under each of Barker's arms and engaged the lift.

12 17. The lift raised Barker approximately six inches above his wheelchair.
13 Due to this improper use of the lift, Barker's back popped and he cried out in pain
14 as he was being lifted.

15 18. Osemwingie and Ramiscal lowered Barker back into his wheelchair,
16 and Barker immediately requested medical attention to address the injury to his
17 back.

18 19. A nurse responded to Barker's request for medical attention
19 approximately two and a half hours later.

20 20. On or about March 9, 2015, Ramiscal helped Barker transfer from his
21 wheelchair to the toilet and then left the room.

22 21. After he was done using the toilet, Barker engaged his call button to
23 request assistance transferring from the toilet back to his wheelchair.

24 22. Barker had to engage his call button several times, and waited
25 approximately 20 minutes before nursing staff arrived to assist him.

26 23. As a result of sitting on the toilet for a prolonged period of time,
27 Barker suffered from pain in his back, legs, and groin, and required additional pain
28

1 medication above and beyond what he is normally prescribed for pain
2 management.

3 24. On August 13, 2015, Barker exhausted all administrative remedies
4 available to him.

5 25. On May 19, 2016, the California Victim Compensation and
6 Government Claims Board denied Barker's claim.

7 **COUNT ONE**

8 **Title II of the Americans with Disabilities Act of 1990**

9 26. Title II of the ADA provides that "no qualified individual with a
10 disability shall, by reason of such disability, be excluded from participation in or
11 be denied the benefits of the services, programs, or activities of a public entity, or
12 be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

13 27. Barker is a qualified individual with a disability in the United States
14 as defined by the ADA. 42 U.S.C. § 12102.

15 28. The improper use of a hooyer lift to transfer Barker from his
16 wheelchair, and a prolonged delay in receiving medical and nursing assistance
17 resulted in discrimination against Barker by prolonging his suffering needlessly.
18 The accommodations that Barker requires are necessary to perform daily life
19 functions able-bodied individuals do not need. Had Barker not been physically
20 disabled, he would not have been injured by the acts and omissions of defendants.

21 29. Because these acts and omissions evince deliberate indifference,
22 Barker seeks actual damages, costs, and legal expense under the ADA. 42 U.S.C.
23 §§ 12133, 12205.

24 30. Barker also seeks declaratory relief so that he may pursue statutory
25 minimum damages under parallel state law claims.

COUNT TWO

Section 504 of the Rehabilitation Act of 1973

31. Section 504 of the Rehabilitation Act provides that “no otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.” 29 U.S.C. § 794 (a).

32. Section 504 of the Rehabilitation Act imposes the same obligations and liability on entities as Title II of the ADA. *See Wong v. Regents of the Univ. of Calif.*, 192 F.3d 807, 811 n.2 (9th Cir. 1999).

33. Defendants receive federal funding.

34. Defendants were deliberately indifferent to Barker’s rights under the Rehab Act because defendants improperly used a hooyer lift to transfer Barker from his wheelchair, and unreasonably delayed responding to Barker’s request for medical and nursing assistance.

35. Barker suffered discrimination under a program that receives federal financial assistance because of defendants’ indifference.

36. Barker seeks actual damages and, reasonable attorney fees and costs under the Rehabilitation Act. 29 U.S.C. § 794(a)(2).

PRAYER FOR RELIEF

WHEREFORE, Barker prays judgment against the defendants for:

1. General and special damages according to proof.
2. Attorneys' fees, litigation expenses, and costs of suit.
3. Interest at the legal rate from the date of the filing of this action.
4. Such other and further relief as the court may deem proper.

Dated: April 12, 2022

ZINK & LENZI

/s/ J.D. Zink

J.D. ZINK

Attorney for Plaintiff Barker

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM BARKER,

Plaintiff,

v.

OSEMWINGIE, et al.,

Defendants.

No. 2:16-cv-3008 CKD P

ORDER

Plaintiff has submitted a third amended complaint which the court must screen pursuant to 28 U.S.C. § 1915A(a). The court has reviewed the third amended complaint and it appears there is an error. In paragraph 16, plaintiff complains about the manner in which a Hoyer lift was used to transfer plaintiff from his wheelchair to his bed. Over the course of this action, however, plaintiff has maintained that defendants are liable for the manner in which a Hoyer lift was used to transfer plaintiff from his wheelchair to a toilet.

////

////

////

////

////

////

1 In accordance with the above, IT IS HEREBY ORDERED that plaintiff is granted 14 days
2 to either file a fourth amended complaint to correct the error identified above or inform the court
3 he wishes to proceed on the third amended complaint as is. If the court does not receive a
4 response to this order, this matter will proceed on the third amended complaint.

5 Dated: April 7, 2022



CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

10 1
11 bark3008.4th

1 J.D. Zink, SBN 58726
2 **Zink & Lenzi**
3 250 Vallombrosa Avenue, Suite 175
4 Chico, California 95926
5 Telephone: (530) 895-1234
6 Facsimile: (530) 895-1254
7
8
9

10 United States District Court
11 Eastern District of California

12 William Barker,)
13)
14 Plaintiff,) Case No. 2:16-cv-3008-CKD
15 v.) **Second Amended Complaint**
16)
17 California Department of Corrections)
18 and Rehabilitation; The State of)
19 California,)
20 Defendants.)
21)
22)
23)
24)
25)
26)
27)
28)

COMPLAINT

1
2 1. Plaintiff William Barker (“Barker”) complains that the California
3 Department of Corrections and Rehabilitation (“CDCR”), the State of California,
4 and Certified Nursing Assistants (“CNA”) Stephen Osemwingie (“Osemwingie”)
5 and Ms. Ramiscal (“Ramiscal”) discriminated against him on the basis of his
6 disability at the California Health Care Facility (“CHCF”) and, thus, violated state
7 and federal disabled access laws.

PARTIES

8
9 2. Barker is a California resident with physical disabilities. He is in the
10 custody, care, and control of CDCR incarcerated at CHCF in Stockton, CA. CDCR
11 physicians have diagnosed Barker with having a history of chronic infectious
12 disease, a right femur fracture with open reduction and internal fixation, and severe
13 degenerative arthritis in his right hip. Barker suffers from pain in his back,
14 shoulder, and neck. Additionally, he has shrapnel lodged in his pelvic region that
15 surgeons are unable to remove which cause him pain when moving. He requires a
16 wheelchair for ambulating both inside and outside of his cell. He is unable to bend,
17 squat, or kneel, lift more than five pounds, climb stairs, and is subject to falls.

18 3. Barker was designated DPW under the *Armstrong* Consent Decree, as
19 an inmate who requires the use of a wheelchair on a full-time basis due to a
20 permanent disability. He requires wheelchair accessible housing and accessible
21 paths of travel.

22 4. The State of California is a public entity.

23 5. CDCR is a department or agency (or both) of the State of California.

24 6. Osemwingie is an employee of the State of California, was a CNA at
25 the time Barker’s injury occurred, and was charged with the care, custody and
26 safety of the inmates at CHCF, including Barker. Osemwingie was acting under
27 the color of state law during all times at issue.
28

7. Ramiscal is an employee of the State of California, was a CNA at the time Barker's injury occurred, and was charged with the care, custody and safety of the inmates at CHCF, including Barker. Ramiscal was acting under the color of state law during all times at issue.

JURISDICTION

8. This Court has original jurisdiction under 28 U.S.C. §§ 1331 and 1343 for claims brought under Title II of the Americans with Disabilities Act of 1990 (“ADA”), Section 504 of the Rehabilitation Act of 1973 (“Rehab Act”), and state law claims that arise under federal law because Barker’s right to relief under those claims necessarily depend on resolving a substantial question of federal law.

9. Supplemental jurisdiction for claims brought under parallel California law – arising from the same nucleus of operative facts – is predicated on 28 U.S.C. § 1367.

10. Barker's claims are authorized by 28 U.S.C. §§ 2201 and 2202.

VENUE

11. All actions complained of herein take place within the jurisdiction of the United States District Court, Eastern District of California, and venue is invoked pursuant to 28 U.S.C. § 1391(b), (c).

FACTS

12. The Disability Placement Program (“DPP”) is the CDCR’s set of plans, policies, and procedures to assure nondiscrimination against inmates/parolees with disabilities. The DPP applies to all CDCR institutions and facilities, all programs that CDCR provides or operates, and to all inmates who have disabilities that affect a major life activity, regardless of whether the disability impacts placement. Under this program, inmates with permanent mobility impairments, or other disabilities severe enough to require special housing and programming, are assigned to special placement in a “designated DPP facility.”

1 13. CHCF is a designated DPP facility.

2 14. Designated DPP facilities are required to offer disabled inmates a
3 range of programming equivalent to that available to nondisabled inmates.

4 15. On or about March 3, 2015, Barker needed assistance in transferring
5 himself from his wheelchair to the toilet. CNAs Osemwingie and Ramiscal
6 responded to Barker's call for assistance.

7 16. Over Barker's objections to its use, Osemwingie and Ramiscal
8 employed a hoist lift to effectuate the transfer of Barker from his wheelchair to
9 his bed. Osemwingie and Ramiscal failed to use the device as it was designed to
10 be operated: rather than placing Barker's whole body in the lift, they instead placed
11 the straps under each of Barker's arms and engaged the lift.

12 17. The lift raised Barker approximately six inches above his wheelchair.
13 Due to this improper use of the lift, Barker's back popped and he cried out in pain
14 as he was being lifted.

15 18. Osemwingie and Ramiscal lowered Barker back into his wheelchair,
16 and Barker immediately requested medical attention to address the injury to his
17 back.

18 19. A nurse responded to Barker's request for medical attention
19 approximately two and a half hours later.

20 20. On or about March 9, 2015, Ramiscal helped Barker transfer from his
21 wheelchair to the toilet and then left the room.

22 21. After he was done using the toilet, Barker engaged his call button to
23 request assistance transferring from the toilet back to his wheelchair.

24 22. Barker had to engage his call button several times, and waited
25 approximately 20 minutes before nursing staff arrived to assist him.

26 23. As a result of sitting on the toilet for a prolonged period of time,
27 Barker suffered from pain in his back, legs, and groin, and required additional pain
28

1 medication above and beyond what he is normally prescribed for pain
2 management.

3 24. On August 13, 2015, Barker exhausted all administrative remedies
4 available to him.

5 25. On May 19, 2016, the California Victim Compensation and
6 Government Claims Board denied Barker's claim.

7 **COUNT ONE**

8 **Title II of the Americans with Disabilities Act of 1990**

9 26. Title II of the ADA provides that "no qualified individual with a
10 disability shall, by reason of such disability, be excluded from participation in or
11 be denied the benefits of the services, programs, or activities of a public entity, or
12 be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

13 27. Barker is a qualified individual with a disability in the United States
14 as defined by the ADA. 42 U.S.C. § 12102.

15 28. The improper use of a hooyer lift to transfer Barker from his
16 wheelchair, and a prolonged delay in receiving medical and nursing assistance
17 resulted in discrimination against Barker by prolonging his suffering needlessly.
18 The accommodations that Barker requires are necessary to perform daily life
19 functions able-bodied individuals do not need. Had Barker not been physically
20 disabled, he would not have been injured by the acts and omissions of defendants.

21 29. Because these acts and omissions evince deliberate indifference,
22 Barker seeks actual damages, costs, and legal expense under the ADA. 42 U.S.C.
23 §§ 12133, 12205.

24 30. Barker also seeks declaratory relief so that he may pursue statutory
25 minimum damages under parallel state law claims.

COUNT TWO

Section 504 of the Rehabilitation Act of 1973

31. Section 504 of the Rehabilitation Act provides that “no otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.” 29 U.S.C. § 794 (a).

32. Section 504 of the Rehabilitation Act imposes the same obligations and liability on entities as Title II of the ADA. *See Wong v. Regents of the Univ. of Calif.*, 192 F.3d 807, 811 n.2 (9th Cir. 1999).

33. Defendants receive federal funding.

34. Defendants were deliberately indifferent to Barker’s rights under the Rehab Act because defendants improperly used a hooyer lift to transfer Barker from his wheelchair, and unreasonably delayed responding to Barker’s request for medical and nursing assistance.

35. Barker suffered discrimination under a program that receives federal financial assistance because of defendants’ indifference.

36. Barker seeks actual damages and, reasonable attorney fees and costs under the Rehabilitation Act. 29 U.S.C. § 794(a)(2).

PRAYER FOR RELIEF

WHEREFORE, Barker prays judgment against the defendants for:

1. General and special damages according to proof.
2. Attorneys' fees, litigation expenses, and costs of suit.
3. Interest at the legal rate from the date of the filing of this action.
4. Such other and further relief as the court may deem proper.

Dated: April 1, 2022

ZINK & LENZI

/s/ J.D. Zink

J.D. ZINK

Attorney for Plaintiff Barker

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM BARKER,

Plaintiff,

v.

OSEMWINGIE, et al.,

Defendants.

No. 2:16-cv-3008 CKD P

ORDER

This matter was remanded to this court from the Ninth Circuit on December 21, 2021. Pursuant to the terms of the remand order, plaintiff is granted 30 days within which to file a third amended complaint. In the third amended complaint, plaintiff may raise claims under Title II of the Americans with Disabilities Act (42 U.S.C. § 12131 et seq.) and the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.). Plaintiff may also raise a claim for retaliation under Title V of the Americans with Disabilities Act (42 U.S.C. § 12203). The third amended complaint must comply with the terms of the remand order, bear the docket number assigned this case, and must be

////

////

////

////

////

1 labeled "Third Amended Complaint." Failure to file a third amended complaint in accordance
2 with this order will result in a recommendation that this action be dismissed.

3 Dated: March 4, 2022



CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

8 1
9 bark3008.lta

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

NOV 29 2021

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

WILLIAM BARKER,

Plaintiff-Appellant,

v.

OSEMWINGIE; RAMISCAL,

Defendants-Appellees.

and

STATE OF CALIFORNIA; CALIFORNIA
DEPARTMENT OF CORRECTIONS AND
REHABILITATION,

Defendants.

No. 20-15503
20-15840

D.C. No. 2:16-cv-03008-CKD

MEMORANDUM*

Appeals from the United States District Court
for the Eastern District of California
Carolyn K. Delaney, Magistrate Judge, Presiding

Argued and Submitted November 17, 2021
San Francisco, California

Before: WATFORD and FRIEDLAND, Circuit Judges, and KORMAN, ** District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

William Barker sued the State of California, the California Department of Corrections and Rehabilitation (CDCR), and CDCR employees Osemwingie and Ramiscal for harms arising from a failed attempt to transfer Barker from his wheelchair to the toilet. The district court dismissed with prejudice his claims under Titles II and V of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (RA). The court later granted summary judgment to defendants on Barker's Eighth Amendment claim for inadequate medical treatment under 42 U.S.C. § 1983. We affirm entry of summary judgment for defendants on Barker's Eighth Amendment claim, but we vacate dismissal of his claims under the ADA and RA and remand to the district court with instructions to grant Barker leave to amend his complaint.

1. The district court properly granted summary judgment to Osemwingie and Ramiscal on Barker's Eighth Amendment claim for inadequate medical treatment. Barker failed to raise a triable issue of fact as to whether defendants acted with deliberate indifference to his serious medical needs. *See Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006). The district court properly excluded statements allegedly made by Nurse Coloma as inadmissible hearsay, and defendants submitted un rebutted expert evidence supporting their assertion that use of the lift was medically appropriate, even if Barker suffered from a chronic back condition. Thus, even if a genuine dispute exists as to whether Barker informed

defendants of his back condition, he cannot satisfy the objective prong of the deliberate indifference test applicable to this claim. We also affirm the district court's award of costs to defendants, as those costs were incurred solely in connection with Barker's Eighth Amendment claim, and Barker raises no independent challenge to the propriety of the award.

2. The district court erred in dismissing Barker's Title II and RA claims without leave to amend. Transferring an inmate from a wheelchair to the toilet is an accommodation to provide access to toileting services, rather than medical treatment for a disability. *See Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1068 (9th Cir. 2010). Thus, the district court improperly relied on *Simmons v. Navajo County*, 609 F.3d 1011, 1022 (9th Cir. 2010) (holding that denial of medical treatment cannot form the basis of an ADA claim), in concluding that Barker's claims were barred as a matter of law.

Barker's second amended complaint does not adequately allege failure to provide access to a service under Title II or the RA, but he should have been granted leave to amend to cure the deficiencies. To allege a plausible claim for relief, Barker will need to provide additional facts explaining how the State's failed attempt to provide access to toileting services by means of the Hoyer lift amounted to a denial of such services on account of his disability. In addition, because Barker seeks damages under Title II, he will need to plead facts plausibly

suggesting that the defendants acted with deliberate indifference under the test established in *Duvall v. County of Kitsap*, 260 F.3d 1124, 1138–40 (9th Cir. 2001). We note that the *Duvall* standard differs from the standard for deliberate indifference applicable to Barker’s Eighth Amendment claim, so the record developed in connection with the latter claim does not necessarily foreclose Barker’s ability to assert a viable Title II damages claim. Since it is not clear that amendment would be futile, we vacate the dismissal of the Title II and RA claims and remand with instructions to grant Barker leave to amend those claims.

3. The district court abused its discretion in dismissing Barker’s retaliation claim under Title V of the ADA based on improper joinder. *See* Fed. R. Civ. P. 18(a). The court’s ruling was predicated on its ruling dismissing Barker’s Title II and RA claims without leave to amend. Because an opportunity to amend those claims against the State and CDCR should have been granted before any final judgment could be entered, those defendants should have remained in the suit and Barker’s Title V claim against the same defendants was not improperly joined. However, as with Barker’s Title II and RA claims, the allegations in the second amended complaint do not adequately support a claim under Title V. In particular, the allegations do not plausibly suggest a causal link between Barker’s protected activities and the alleged retaliation. *See T.B. ex rel. Brenneise v. San Diego Unified Sch. Dist.*, 806 F.3d 451, 472–73 (9th Cir. 2015). Nevertheless, because it

is not clear that amendment would be futile, we vacate dismissal of the Title V claim and remand with instructions to grant leave to amend.

AFFIRMED in part, VACATED in part, and REMANDED.

Barker shall recover his costs on appeal.

XAVIER BECERRA, State Bar No. 118517
Attorney General of California
PETER A. MESHOT, State Bar No. 117061
Supervising Deputy Attorney General
DIANA ESQUIVEL, State Bar No. 202954
Deputy Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 210-7320
Facsimile: (916) 322-8288
E-mail: Diana.Esquivel@doj.ca.gov
Attorneys for Defendants Osemwingie and Ramiscal

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

WILLIAM BARKER,

Plaintiff,

v.

OSEMWINGIE, et al.,

Defendants.

No. 2:16-cv-03008 CKD (PC)

**DECLARATION OF DIANA ESQUIVEL
IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

Date: May 22, 2019
Time: 10:00 a.m.
Courtroom: 24 (8th Floor)
Judge: Hon. Carolyn K. Delaney
Trial Date: Not yet set
Action Filed: April 12, 2017

I, Diana Esquivel, declare:

1. I am admitted to practice law in California and before this Court, and am a Deputy Attorney General with the Office of the Attorney General for the State of California, attorneys of record for Defendants Osemwingie and Ramiscal.

2. Exhibit A is a copy of Plaintiff's Bed Assignment history from the California Department of Corrections and Rehabilitation (CDCR), showing Plaintiff's housing assignments from April 2014 to May 2018.

1 3. Exhibit **B** includes excerpts of the relevant portions of the condensed transcript of the
2 Plaintiff's deposition taken on October 3, 2018.

3 4. Exhibit **C** includes a copy of the relevant records from Plaintiff's medical file with
4 CDCR and the declaration of the custodian of records authenticating the documents. As required
5 under Federal Rule of Civil Procedure 5.2 and Local Rule 140(a), birthdates and other
6 confidential information has been redacted.

7 5. Attached as Exhibit **D** is a copy of Dr. Bennett Feinberg's expert report that Defendants
8 disclosed.

9 6. Exhibit **E** is a true and correct copy of a 2015 calendar that I downloaded from the
10 internet.

11 7. Exhibit **F** is a copy of Defendants' Expert Disclosures that includes the report of
12 Michelle E. Camicia, PhD, RN, PHN, CRRN, CCM, NEA-BC, FAHA.

13 8. Exhibit **G** is a true and correct copy of Plaintiff's responses to the first set of
14 interrogatories, dated August 6, 2018. To date, Plaintiff has not provided a written, signed
15 verification to these responses. At his deposition, Plaintiff testified that he reviewed the
16 responses and signed a verification attesting the responses were true and correct to the best of his
17 knowledge. (*See* Barker Dep. 24:10-25:6.)

18 9. Exhibit **H** is a true and correct copy of Plaintiff's responses to the first set of production
19 requests, dated August 6, 2018.

20 I declare under penalty of perjury under the laws of the United States that the foregoing
21 statements are true and correct.

22
23 Dated: April 24, 2019

/s/ Diana Esquivel
Diana Esquivel

24
25 SA2017304374
26 13655026.docx
27
28

Exhibit F

MICHELLE E. CAMICIA

PhD, RN, PHN, CRRN, CCM, NEA-BC, FAHA
201 Caribe Isle • Novato, CA 94949
(415) 601-2621 • mecamicia@gmail.com

January 24, 2019

Diana Esquivel
Deputy Attorney General
1300 I Street, Suite 125
Sacramento, CA 95814

RE: *Barker, William v. Osemwingie, Stephen and Ramiscal, Maria*
USDC, Eastern District of California, No. 2:16-cv-03008 JAM-CKD (PC)

INTRODUCTION

I am a registered nurse with substantial experience in the care of individuals with mobility impairments. I have been retained as an expert to review materials and provide expert opinions on this matter, including the state of the nursing and scientific literature as of the date of the event, and to consider and render expert opinion on whether the nursing care rendered by the Defendants at the California Health Care Facility in Stockton to Mr. William Barker on March 3, 2015, was reasonable and appropriate and whether the standard of care was met. After careful review, it is my opinion, to a reasonable degree of clinical certainty, that the care provided by the Defendant Certified Nursing Assistants to Mr. Barker was appropriate, and the nursing care rendered to him did not breach the standard of care.

MATERIALS REVIEWED

I reviewed the following material pertaining to the above-referenced case:

1. Plaintiff's Second Amended Complaint, dated January 19, 2018
2. Medical records of William Barker (bates stamp AG01-AG01274)
3. Deposition Transcript of William Barker, October 3, 2018
4. Plaintiff's Response to Interrogatories, Set One

OVERVIEW OF OPINIONS

1. The utilization of a mechanical lift to move Mr. Barker from the wheelchair to the toilet by the defendants (Osemwingie and Ramiscal) at California Health Care Facility in Stockton was appropriate and met the standard of care.
2. The approach used to move Mr. Barker with the floor-lift and sling was appropriate and does not indicate a breach in the standard of care.

ANALYSIS

Plaintiff William Barker is a wheelchair dependent inmate who has been incarcerated at the California Health Care Facility (CHCF) in Stockton since February 28, 2015 to the present. Mr. Barker experiences chronic right hip and back pain, weakness and muscle spasms in his legs, and claims he does not have functional use of his right leg. He has had varying ability to bear weight in his lower extremities and noted to be unable to bear weight on February 25, 2015, in addition to being unable to stand. He has used a wheelchair for mobility for an extended period of time, and had numerous falls in January 2015. Since that time, he reported his left hip was hurting and has required assistance with moving from one surface to another (e.g. bed to chair), and on January 27, 2015, he required the assistance of two people to move from the wheelchair to a gurney. Mr. Barker reports that moving from his wheelchair to the toilet is the most challenging transfer for him. The amount of assistance he required for transfers varied, from only needing about 25% assistance of a care provider (minimal assistance) to requiring two health care providers assisting with 50% of the effort (moderate assistance), to that of requiring total assistance from a care provider.

Mr. Barker alleges that on March 3, 2015, two Certified Nursing Assistants (CNAs), Stephen Osemwingie and Maria Ramiscal, improperly used the Hoyer lift when attempting to assist him move from the wheelchair to the toilet, causing injury to his chronic back. Mr. Barker claims that

the CNAs were deliberately indifferent to his serious medical needs by using the lift in the manner that they did despite knowledge of his chronic back condition.

DETAILED REVIEW OF OPINIONS

1. The utilization of a mechanical lift to move Mr. Barker from the wheelchair to the toilet by the Defendants was appropriate and met the standard of care.

Based on the documentation reviewed above, Defendants' actions met the standard of care. Mr. Barker is a large, heavy-set man who weighs approximately 250 pounds. He requires the use of a wheelchair for mobility. He is unable to move from one surface to another without assistance, however, the amount of assistance required varies. The amount of assistance closest to the March 3, 2015 event was minimal assistance of two people. Given that Mr. Barker weighs approximately 250 pounds, he would require each of the persons assisting him with a manual transfer (no patient lifting equipment) to lift approximately 62 pounds each. However, Mr. Barker was known to require much more assistance than this, including total assistance with transfers.

Moving patients from one surface to another is a high-risk activity and results in biomechanical strain to the helper. The maximum weight that a helper should manually lift under the best of circumstances is 35 pounds. Transferring a patient from the chair to the toilet is considered a high-risk-patient-handling task. Carrying out an activity that exceeds a helper's biomechanical capabilities causes damage to the musculoskeletal system. Manually lifting patients who weigh more than 35 pounds (even under optimal circumstances) is such an activity and, consequently, results in injury to the helper. Such patient-handling activities are an occupational risk for members of the nursing staff, and nursing roles are among the highest risk for injury across all vocations. Because of this, it is widely accepted that manual lifting of patients by health care providers should be minimized in all cases and eliminated whenever possible. This is achieved

through the use of mechanical lifts, such as the Hoyer lift, for moving patients. Use of such mechanical lifts for moving patients is safer for both the patient and the health care professional. The selection of a patient lift is determined by assessment criteria for safe patient handling and movement. This includes the patient's level of assistance, weight-bearing capability, upper-extremity strength, level of cooperation, weight, and height. The portable lift with a sling (the device used by the Defendants on Mr. Barker) is the appropriate device for lifting patients who are partial- or non-weight-bearing for transfers from wheelchair to the toilet.

Further, the selection of a device must always consider the situation where the most help is needed. Whenever there is variation in the patient's function (e.g. able to help more sometimes than at other times), the device selected needs to reflect the scenario where the most help is needed. Mr. Barker was new to the facility staff. The information available to the nursing staff providing care for Mr. Barker on March 2, 2015, indicates that he is unable to bear weight and needs assistance with transfers. His medical record reflects that he "attempts to go dead weight when male nurses assisting him." Further, he refused to stand on multiple occasions, and was requesting maximum assistance to transfer just one week prior to the event. Based on these factors and the risk a manual lift posed to both Mr. Barker and the Defendants, it was appropriate for the Defendants to use the Hoyer lift to transfer him from his chair to the toilet on March 3, 2015.

2. The approach used to move Mr. Barker with the floor-lift and sling was appropriate and does not indicate a breach in the standard of care.

A seated sling is used to transfer patients from seated positions to seated positions (e.g. chair to toilet) with a floor-patient-lifting device. However, Mr. Barker complained that if the bottom hooks of the sling were utilized, it would cause pain to his scrotum or testicles as a result of the presence of a bullet. The Defendants accommodated his request and only hooked the top

two upper-section hooks. Full-body sling lifts when secured by the upper section provide partial support and assistance for patients with some weight-bearing ability, acting in a similar manner to that of a stand-assist lifting device or an appropriate manual lift with the assistance of two people.

The Defendants managed Mr. Barker's mobility needs appropriately. Two people were in attendance during the transfer, and the mechanical floor-based sling lift was assisting with the transfer. Mr. Barker's chronic back condition was not a contraindication to the use of the mechanical lift in this manner. As stated above, the manner in which the Defendants employed the mechanical lift acted in the same manner as if the Defendants had manually lifted Mr. Barker, but without the risk of injury to either patient or staff. Although Mr. Barker alleges that his back was injured because of the manner in which the mechanical lift was used, I do not see any evidence that his back would not have been injured had the Defendants performed a manual lift instead. Based on Mr. Barker's complaints of pain to his scrotum if the bottom hooks had been utilized, it would have been improper for the Defendants to forcibly move him in a manner which would have certainly caused him pain. For these reasons, the process and steps taken to mechanically assist Mr. Barker with the transfer by the Defendants were appropriate and met the standard of care.

BACKGROUND

I am the Director for Kaiser Foundation Rehabilitation Center in Vallejo, California. I am a Certified Registered Rehabilitation Nurse (CRRN) specializing in care for individuals with disabling and chronic conditions. I am a past president of the Association of Rehabilitation Nurses and an expert in the field of rehabilitation nursing.

As required under Federal Rule of Civil Procedure 26, Appendix A is a copy of my current Curriculum Vitae, which includes a list of papers that I have authored. Appendix B is a list of all cases in which I have testified as an expert in trial or deposition within the preceding

four years. Appendix C is my fee schedule.

My expertise has been formed over time from my years of clinical practice, reading, continuing education and research, including the manuscripts included in Appendix A. The opinions stated above are true and correct within a reasonable degree of clinical probability.

Respectfully,

Michelle Camicia

Michelle Camicia, PhD, RN, MSN, CRRN, CCM, NEA-BC, FAHA

United States District Court
Eastern District of California

1
 2
 3
 4
 5
 6
 7
 8
 9
 10
 11
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25
 26
 27
 28
 29
 30
 31
 32
 33
 34
 35
 36
 37
 38
 39
 40
 41
 42
 43
 44
 45
 46
 47
 48
 49
 50
 51
 52
 53
 54
 55
 56
 57
 58
 59
 60
 61
 62
 63
 64
 65
 66
 67
 68
 69
 70
 71
 72
 73
 74
 75
 76
 77
 78
 79
 80
 81
 82
 83
 84
 85
 86
 87
 88
 89
 90
 91
 92
 93
 94
 95
 96
 97
 98
 99
 100
 101
 102
 103
 104
 105
 106
 107
 108
 109
 110
 111
 112
 113
 114
 115
 116
 117
 118
 119
 120
 121
 122
 123
 124
 125
 126
 127
 128
 129
 130
 131
 132
 133
 134
 135
 136
 137
 138
 139
 140
 141
 142
 143
 144
 145
 146
 147
 148
 149
 150
 151
 152
 153
 154
 155
 156
 157
 158
 159
 160
 161
 162
 163
 164
 165
 166
 167
 168
 169
 170
 171
 172
 173
 174
 175
 176
 177
 178
 179
 180
 181
 182
 183
 184
 185
 186
 187
 188
 189
 190
 191
 192
 193
 194
 195
 196
 197
 198
 199
 200
 201
 202
 203
 204
 205
 206
 207
 208
 209
 210
 211
 212
 213
 214
 215
 216
 217
 218
 219
 220
 221
 222
 223
 224
 225
 226
 227
 228
 229
 230
 231
 232
 233
 234
 235
 236
 237
 238
 239
 240
 241
 242
 243
 244
 245
 246
 247
 248
 249
 250
 251
 252
 253
 254
 255
 256
 257
 258
 259
 260
 261
 262
 263
 264
 265
 266
 267
 268
 269
 270
 271
 272
 273
 274
 275
 276
 277
 278
 279
 280
 281
 282
 283
 284
 285
 286
 287
 288
 289
 290
 291
 292
 293
 294
 295
 296
 297
 298
 299
 300
 301
 302
 303
 304
 305
 306
 307
 308
 309
 310
 311
 312
 313
 314
 315
 316
 317
 318
 319
 320
 321
 322
 323
 324
 325
 326
 327
 328
 329
 330
 331
 332
 333
 334
 335
 336
 337
 338
 339
 340
 341
 342
 343
 344
 345
 346
 347
 348
 349
 350
 351
 352
 353
 354
 355
 356
 357
 358
 359
 360
 361
 362
 363
 364
 365
 366
 367
 368
 369
 370
 371
 372
 373
 374
 375
 376
 377
 378
 379
 380
 381
 382
 383
 384
 385
 386
 387
 388
 389
 390
 391
 392
 393
 394
 395
 396
 397
 398
 399
 400
 401
 402
 403
 404
 405
 406
 407
 408
 409
 410
 411
 412
 413
 414
 415
 416
 417
 418
 419
 420
 421
 422
 423
 424
 425
 426
 427
 428
 429
 430
 431
 432
 433
 434
 435
 436
 437
 438
 439
 440
 441
 442
 443
 444
 445
 446
 447
 448
 449
 450
 451
 452
 453
 454
 455
 456
 457
 458
 459
 460
 461
 462
 463
 464
 465
 466
 467
 468
 469
 470
 471
 472
 473
 474
 475
 476
 477
 478
 479
 480
 481
 482
 483
 484
 485
 486
 487
 488
 489
 490
 491
 492
 493
 494
 495
 496
 497
 498
 499
 500
 501
 502
 503
 504
 505
 506
 507
 508
 509
 510
 511
 512
 513
 514
 515
 516
 517
 518
 519
 520
 521
 522
 523
 524
 525

Case No. 2:16-cv-3008-CKD

**Plaintiff's Second Amended
Complaint**

Stephen Osemwingie, CNA; Ms.
Ramiscal, CNA,
Defendants.

Barker v. California Department of Corrections and Rehabilitation, et al.
Plaintiff's Second Amended Complaint

COMPLAINT

1
2 1. Plaintiff William Barker (“Barker”) complains that Certified
3 Nursing Assistants (“CNA”) Stephen Osemwingie (“Osemwingie”) and Ms.
4 Ramiscal (“Ramiscal”) discriminated against him on the basis of his disability at
5 the California Health Care Facility (“CHCF”) and, thus, violated Barker’s right to
6 be free of cruel and unusual punishment under the Eighth Amendment of the
7 United States Constitution.

PARTIES

8
9 2. Barker is a California resident with physical disabilities. He is in the
10 custody, care, and control of California Department of Corrections and
11 Rehabilitation (“CDCR”) incarcerated at CHCF in Stockton, CA. CDCR
12 physicians have diagnosed Barker with having a history of chronic infectious
13 disease, a right femur fracture with open reduction and internal fixation, and
14 severe degenerative arthritis in his right hip. Barker suffers from pain in his back,
15 shoulder, and neck. Barker also has shrapnel lodged in his pelvic region that
16 surgeons are unable to remove which cause him pain when moving.
17 Additionally, Barker is a large, heavy-set man who exceeds 250 pounds. He
18 requires a wheelchair for ambulating both inside and outside of his cell, and
19 cannot transfer to and from his wheelchair unaided. He is unable to bend, squat,
20 or kneel, lift more than five pounds, climb stairs, and is subject to falls.

21 3. Barker was designated DPW under the *Armstrong* Consent Decree,
22 as an inmate who requires the use of a wheelchair on a full time basis due to a
23 permanent disability. He requires wheelchair accessible housing and accessible
24 paths of travel.

25 4. Osemwingie is an employee of the State of California, was a CNA at
26 the time Barker’s injury occurred, and was charged with the care, custody and
27

28 *Barker v. California Department of Corrections and Rehabilitation, et al.*

1 safety of the inmates at CHCF, including Barker. Osemwingie was acting under
2 the color of state law during all times at issue.

3 5. Ramiscal is an employee of the State of California, was a CNA at
4 the time Barker's injury occurred, and was charged with the care, custody and
5 safety of the inmates at CHCF, including Barker. Ramiscal was acting under the
6 color of state law during all times at issue.

7 JURISDICTION

8 6. This Court has original jurisdiction under 42 U.S.C. § 1983 for
9 claims brought under the Eighth Amendment of the United States Constitution
10 because Barker complains that his civil rights were violated.

11 7. Barker's claims are authorized by 28 U.S.C. §§ 2201 and 2202.

12 VENUE

13 8. All actions complained of herein take place within the jurisdiction of
14 the United States District Court, Eastern District of California, and venue is
15 invoked pursuant to 28 U.S.C. § 1391(b), (c).

16 FACTS

17 9. The Disability Placement Program ("DPP") is the CDCR's set of
18 plans, policies, and procedures to assure nondiscrimination against
19 inmates/parolees with disabilities. The DPP applies to all CDCR institutions and
20 facilities, all programs that CDCR provides or operates, and to all inmates who
21 have disabilities that affect a major life activity, regardless of whether the
22 disability impacts placement. Under this program, inmates with permanent
23 mobility impairments, or other disabilities severe enough to require special
24 housing and programming, are assigned to special placement in a "designated
25 DPP facility."

26 10. CHCF is a designated DPP facility.

1 11. Designated DPP facilities are required to offer disabled inmates a
2 range of programming equivalent to that available to nondisabled inmates.

3 12. On or about March 3, 2015, Barker needed assistance in transferring
4 himself from his wheelchair to the toilet. CNAs Osemwingie and Ramiscal
5 responded to Barker's call for assistance.

6 13. Over Barker's objections to its use, Osemwingie and Ramiscal
7 employed a hoier lift to effectuate the transfer of Barker from his wheelchair to
8 the toilet.

9 14. A hoier lift is a specialized hydraulic lift with a U-shaped sling that
10 is designed to move patients that are unable to stand on their own and/or whose
11 weight makes it unsafe to move or lift them manually. In order to properly use a
12 hoier lift, the operator must slide the U-shaped sling behind the individual to be
13 moved, and then secure the individual's legs by crossing the sling's straps before
14 attaching the straps to the lift cradle and raising the individual. Once a hoier lift
15 is properly deployed, the individual is in a seated position.

16 15. Osemwingie and Ramiscal failed to use the device as it was
17 designed to be operated: rather than placing Barker's whole body in the lift, they
18 instead placed the straps under each of Barker's arms and engaged the lift.

19 16. The lift raised Barker approximately six inches above his
20 wheelchair. Due to this improper use of the lift, Barker's back popped and he
21 cried out in pain as he was being lifted.

22 17. Osemwingie and Ramiscal lowered Barker back into his wheelchair,
23 and Barker immediately requested medical attention to address the injury to his
24 back.

25 18. A nurse responded to Barker's request for medical attention
26 approximately two and a half hours later.

27
28 *Barker v. California Department of Corrections and Rehabilitation, et al.*

19. Osemwingie and Ramiscal knew how to properly deploy a hoist lift from their CNA training, and used the lift regularly if not daily. Osemwingie and Ramiscal knew that, because Barker is a large, heavy-set man exceeding 250 pounds, the improper way in which they used the hoist lift would result in lift failure and/or injury to Barker.

20. On August 13, 2015, Barker exhausted all administrative remedies available to him.

21. On May 19, 2016, the California Victim Compensation and Government Claims Board denied Barker's claim.

COUNT ONE

U.S. CONST. amend. VIII (Eighth Amendment)

Against defendants Osemwingie and Ramiscal

22. Defendants Osemwingie and Ramiscal – in their individual capacity and acting under color of law – violated plaintiff’s right to be free of cruel and unusual punishment, guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution.

23. The Eighth Amendment prohibits “cruel and unusual punishments.”
U.S. CONST. amend. VIII.

24. The Supreme Court holds that “[d]eliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain, proscribed by the Eighth Amendment.” *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976).

25. In the Ninth Circuit, the test for deliberate indifference consists of two parts. *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006). First, plaintiff must show a serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain. *Id.* Plaintiff has a serious medical need when he

Barker v. California Department of Corrections and Rehabilitation, et al.

1 has “a medical condition that significantly affects an individual's daily
2 activities.” *McGuckin v. Smith*, 974 F.2d 1050, 1059-1060 (9th
3 Cir.1992), overruled in part on other grounds by *WMX Techs., Inc. v. Miller*, 104
4 F.3d 1133 (9th Cir.1997).

5 26. Second, the plaintiff must show the defendant’s response to the need
6 was deliberately indifferent by showing (a) a purposeful act or failure to respond
7 to a prisoner’s pain or possible medical need and (b) harm caused by the
8 indifference. *Penner*, 439 F.3d at 1096. Indifference may appear when prison
9 officials deny, delay, or intentionally interfere with medical treatment. *Id.* A
10 prisoner need not show his harm was substantial. *Id.*

11 27. Here, Osemwingie and Ramiscal were deliberately indifferent to
12 Barker’s serious medical needs. First, Barker has a serious medical need, as he is
13 unable to walk or stand and requires the use of a wheelchair, and cannot transfer
14 to and from his wheelchair unaided. Second, Osemwingie and Ramiscal knew
15 that, because Barker is a large, heavy-set man exceeding 250 pounds, the
16 improper way in which they used the hoist lift would result in lift failure and/or
17 injury to Barker. Indeed, their failure to properly deploy the hoist lift actually
18 did result in injury to Barker’s back.

19 28. Barker seeks general damages. He also seeks reasonable
20 compensation for his legal costs, attorney’s fees, and expert fees. 42 U.S.C. §§
21 1988(b), (c).

PRAYER FOR RELIEF

WHEREFORE, Barker prays judgment against the defendants for:

1. General damages.
2. Attorneys' fees, litigation expenses, and costs of suit.
3. Interest at the legal rate from the date of the filing of this action.
4. Such other and further relief as the court may deem proper.

Dated: January 19, 2018

DISABLED ADVOCACY GROUP, APLC

/s/ Scottlynn J Hubbard

SCOTTLYNN J HUBBARD

Attorney for Plaintiff Barker